

## Practical Tips for Virtual Oversight

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As the COVID-19 (novel coronavirus) outbreak continues to wreak havoc across the globe, boards of directors have a critical oversight role to play in helping their companies navigate through these uncertain times. That oversight function is complicated by the fact that the pandemic is evolving at lightning speed and social-distancing requirements preclude in-person meetings. Below are some practical tips for directors exercising their virtual oversight in this rapidly evolving situation:

**Virtual meetings still need minutes, but skip the recording.** Minutes from virtual meetings should include the same content as minutes for in-person meetings, including the date and time of the meeting, the meeting participants, the general topics discussed by the board, and any actions taken by the

board. The minutes should reflect the thoughtful consideration given to the issues without transcript-like detail or lots of adjectives and adverbs. Although the Skype “record” button may be tempting, do not push it. Like minutes, potential plaintiffs can get access to recordings by sending a records request under either Delaware or California corporate law. The minutes, not a recording, should be the official record of the meeting.

**Side discussions are unavoidable, but make sure the entire board is kept in the loop.** There is likely a greater need for one-off discussions in addition to more frequent board meetings during these uncertain times. For example, the CFO may reach out to the head of the audit committee to discuss whether to withdraw previously issued financial guidance. Or the board chairman may reach



out to the COO about the supply chain risk. These side discussions are an important part of the board’s oversight, so the entire board should be advised of key details in a subsequent board meeting, and the side discussions should be memorialized in the board minutes. Specifically, at the board meeting following material one-off discus-

sions, the minutes should reflect that the audit committee chair and the board chairman reported their discussions to the board. Regarding the manner of such side discussions, see the last bullet point below. Email exchanges may not convey sufficient context for discussions of complex issues and may be misconstrued in hindsight.

**Carefully consider the company's COVID-19 disclosures.**

This includes the need to provide adequate disclosures about what the company knows now and additional information regarding the ongoing impact of this pandemic on the company's operations. Review risk factors, MD&A, earnings guidance, financial statements, and other relevant disclosures and ensure that they appropriately disclose known risks, trends, and uncertainties. For example, if the CEO contracts COVID-19, you will likely need to disclose that. Give special consideration to earnings guidance. Discuss with management

whether changed circumstances merit an update to or withdrawal of earlier guidance. Review and update cautionary language to maximize the protection of the safe harbor for forward-looking statements. Plaintiffs' firms are already scouring public company disclosures looking for potential securities litigation opportunities. Two COVID-19 related securities suits have already been filed, and more are expected.

**Be cautious in your written communications.**

As you ramp up virtual communications, the volume and scope of electronic communications will in-

crease. This not only creates an increased cybersecurity risk, but it also creates a litigation risk. That's because board-related emails, texts, and instant messages will come to light in the event of litigation. Best practice is to maintain an official written record in the form of minutes and minimize written communications especially for sensitive topics. Pick up the phone for sensitive topics. If you do send emails, keep things professional and avoid overdramatization. Do not send an email that says: "Coronavirus is going to destroy the company."

In short, directors have a key role to play in ensuring that the companies

they oversee will weather the uncertainty created by the COVID-19 pandemic. In this new age of meeting and collaborating, boards need to look to best practices for keeping an accurate, legal record of communications. ■

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